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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 430 and 834

SAM ACHILLI, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF L. B. BINION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF AMICUS CURIAE

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Now comes L. B. BINION as *amicus curiae*, by his attorneys, and moves the Court for leave to file the attached brief *amicus curiae* in the above-entitled case, and in support of said motion shows:

1. *Amicus curiae* is presently appellant in that certain cause now pending in the United States Court of Appeals for the Fifth Circuit, numbered 16,335, and entitled *L. B. Binion v. United States of America*. The question presented in that appeal is identical with the one presented

in the above-entitled case, namely, whether § 145(b) or § 3616(a) of the Internal Revenue Code of 1939 is applicable to conviction for filing a false income tax return.

2. In view of the identity of questions involved, this Court by order entered March 11, 1957, admitted the *amicus curiae* to bail pending disposition of the above entitled case. See *Binion* v. *United States*, 352 U.S. 1028.

3. The only question sought to be covered in the brief *amicus curiae*, which is appended hereto, is whether § 3616 (a) of the Internal Revenue Code applies to income tax returns.

4. Following are the reasons for believing that this question is not being adequately presented by the parties:

a. The Government's arguments as to the alleged inapplicability of § 3616(a) to income tax returns, see Memorandum for the United States heretofore filed in the present case, are diametrically in conflict with its prior position in similar cases, and are, as the attached brief indicates, of questionable soundness.

b. The brief of Poncet Davis as *amicus curiae* in this case states (pp. 14-15) that "we now make no effort to controvert this latest view" of the Government, viz., that § 3616(a) is inapplicable to income tax violations.

c. The brief of petitioner in No. 666, *Costello* v. *United States*, heretofore filed and involving the same basic question, assumes the applicability of § 3616(a) to income tax prosecutions without discussion, no doubt because the Government in its consent to the granting of certiorari in that case admitted the § 3616(a) point. See Memo. for U. S. in No. 666, this Term, p. 2.

d. Petitioner Achilli's brief herein admits (p. 25) that "Time has not permitted us to research this subject beyond what is here presented."

Amicus curiae therefore believes that the brief he proposes to file, which is not in any sense merely cumulative, will afford this Court assistance not available elsewhere for the resolution of one of the critical issues involved in the above-entitled case.

5. Both parties hereto have refused consent to the filing of a brief *amicus curiae*.

WHEREFORE it is respectfully submitted that the present motion for leave to file should be granted.

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BRIEF OF L. B. BINION, AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* in the present case is set forth in his motion for leave to file, and also appears in the *Per Curiam* order in *Binion* v. *United States*, 352 U.S. 1028.

SUMMARY OF ARGUMENT

For three successive Terms, the Government formally presented in this Court reasons why in its view § 3616(a), I.R.C. 1939, was applicable to income tax returns, and argued that there was an area of overlap between that provision and § 145(b) of the same compilation. Now the Government has suddenly reversed itself, and argues that

§ 3616(a) has nothing to do with the income tax. This brief deals only with the scope of § 3616(a), not with the consequences of the overlap.

1. Section 3616(a) of the Internal Revenue Code of 1939 is directly derived from R. S. § 3179, which in turn was directly taken from § 15 of the Act of June 30, 1864. Since the 1864 Act imposed an income tax, it necessarily follows that § 3616(a), I.R.C., now applies to income tax returns. The meaning of a statute does not change as, without substantive differences, it passes through one or more revisions.

2. R. S. § 3179 was never repealed, either expressly or by implication, but on the contrary was specifically reenacted.

It admittedly applied to the 1894 income tax. The more severe penal provision of the 1909 Act, relied on by the Government to show a supersession *pro tanto*, was specifically limited to the tax then imposed, which was not an income tax. *Flint* v. *Stone-Tracy Co.*, 220 U.S. 107.

The penalty for filing false income tax returns under the Acts of 1913 and 1916 was heavier than that provided in R. S. § 3179. But those penal provisions were limited to the particular Revenue Acts involved, and Congress in the 1916 Act amended numerous related provisions of the Revised Statutes without touching § 3179. Plainly it intended the latter provisions to stand.

In the Revenue Act of 1917, Congress removed the inconsistency as to the penalty for filing false returns, and added the misdemeanor of evading or attempting to evade the tax. In the Revenue Act of 1918, the penalty provision for the latter offense was increased, and nothing was said specifically about filing. Inasmuch as the 1918 Act again effected amendments to related sections of the Revised Statutes, the failure of Congress to deal with § 3179 requires the conclusion that it considered the latter provision adequate to punish the filing of false income tax returns.

In 1924, evading or attempting to evade the tax was made a felony. Nothing in any income tax statute after 1918 dealt with the filing of false income tax returns. Again, R. S. § 3179 was deemed ample to cover the latter offense, a conclusion that becomes irresistible in the face of the Congressional reenactment of R. S. § 3179 as § 3616(a) of the Internal Revenue Code of 1939, and the declaration in § 61 of the same Code that all administrative provisions, which necessarily included § 3616(a), were applicable to the income tax.

3. The Government has for some time prosecuted income tax offenders under § 3616(a). If that section is inapplicable to income tax returns, then the filing of false income tax returns is condemned only as a felony, under § 145(b). That being so, all prosecutions of income tax offenders under § 3616(a) that were commenced by information rather than by indictment have been unlawful. The Government makes no offer to restore persons so convicted.

ARGUMENT

SECTION 3616(a) OF THE INTERNAL REVENUE CODE OF 1939 APPLIES TO INCOME TAX RETURNS

For three successive Terms, on the basis of reasoned and articulated legal argument supported by full citation of authorities, as well as on the basis of the actual course of criminal prosecutions thereunder, it was the Government's position that § 3616(a) of the Internal Revenue Code of 1939 was applicable to income tax returns, and that there was accordingly an area of overlap between that section and § 145(b) of the same Internal Revenue Code. See Br. Op. 7-11 in *Dillon* v. *United States*, No. 629, Oct. T. 1954, certiorari granted, 349 U.S. 914, and dismissed and remanded, 350 U.S. 906; U. S. Br. 10-11, 22-24, in *Berra* v. *United States*, No. 60, Oct. T. 1955, 351 U. S. 131; U. S. Memo., p. 2, in *Costello* v. *United States*, No. 666, Oct. T. 1956, pending on the merits after grant of certiorari, 352

GIVES AS REASONS THEREFOR:

(1) Your movant was Chief Counsel in filing the petition for Certiorari in this case; and, upon denial of such petition on November 19, 1956, and remand to the District Court, withdrew from active participation in the case. Upon receipt of order of this Court dated March 4, 1957, vacating its order of November 19, 1956, your movant filed a motion to withdraw in order to conform to the wishes of the client and new counsel; and

(2) On this date, namely March 18th, your movant was advised by said new Counsel, Peter B. Atwood, Esq., by letter dated March 15th, that he would not consent to the filing of a brief *amicus curiae*; and

(3) The interest of the applicant is that the question of law presented be fully presented to the Court, because the applicant has raised the same issue before the District Court of the United States for the Northern District of Ohio, Western Division, in the cases of the *United States of America* v. *C. O. Hanson* (Docket Nos. 21911, 21912) now pending before Judge Weick on motions in arrest of Judgment, for Judgment of Acquittal, and for a New Trial. In the *Hanson* case all the objections inherent in the issue were raised before trial, during trial and after trial; a situation that is not as clear in the *Achilli* or *Costello* cases.

(4) Your applicant does not believe the questions of law will be adequately raised and presented for the reason that present counsel for *Achilli* states in his letter to applicant dated March 15th: "I am not sold on the point of 'aggravation' which you mentioned;" and, Edward B. Williams, Esq., Counsel in *Frank Costello* v. *U. S.* (Docket No. 666) has informed your

applicant that the point goes beyond the issue in that case; and

(5) The particular point of law your applicant wishes to present to the Court goes to the invalidity of the indictments based on and prosecuted under Section 145 (b) of the Internal Revenue Code of 1939, a felony statute, where the aggravating elements to raise a misdemeanor (Section 3616 (a)) to a felony are not set forth in the indictment. Our position is grounded on:

(a) Assuming arguendo, as this Court did in *Berra* v. *United States* (351 U.S. 131), that Sections 3616 (a) and 145 (b) of the Internal Revenue Code of 1939 both apply to income tax evasion cases; and that the government had the right of election respecting the statute under which the indictment and prosecution should be brought and prosecuted; then

(b) The rule that any aggravation of an offense for which the law authorizes an increase in punishment must be stated in the indictment applies. See *Aderhold, Warden* v. *Pace*, 65 Fed. 2nd 701; *United States* v. *Berkowitz*, 45 Fed. Supp. 564; *Olivito* v. *U. S.*, 67 Fed. 2nd 564; *Meyers* v. *U. S.*, 116 Fed. 2nd 601; *Jordan* v. *U. S.*, 233 Fed. 2nd 362; *U. S.* v. *Standard Brewery, Inc.*, 251 U.S. 210; and, that

(c) The indictments in the *Achilli, Costello* and *Hanson* cases, containing no aggravating elements, cannot stand as a felony; nor can they drop to a misdemeanor level without a separate misdemeanor count (Rule 8 (a) F.R.C.P.).

(d) The validity of the indictment and the right to prosecute the felony, and the absence of a misdemeanor

count are relevant to both the *Achilli* and *Costello* cases.

(e) The applicant has a brief in course of preparation now and will meet the filing date of March 30th, 1957, ordered in the *Achilli* case, should this Court grant this motion.

WHEREFORE, it is prayed that this motion for leave to file the brief and argue it be granted.

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